

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA  
Plaintiff,

v.

DRAVO CORPORATION,  
DESCO CORPORATION, and  
DESCO CORPORATION d/b/a  
MARSHALLTOWN  
INSTRUMENTS, INC.  
Defendants.

CIVIL ACTION NO. 8:01CV500

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I. BACKGROUND

A. On September 27, 2001, the United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Colorado Avenue Subsite of the Hastings Ground Water Contamination Superfund Site in Hastings, Nebraska together with accrued interest; and (2) a declaratory judgment, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613, for all future response costs to be incurred by the United States in connection with the Subsite.

C. In accordance with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP") and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Nebraska (the "State") on December 21, 2004 of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Colorado Avenue Subsite, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the United States Department of Interior on December 21, 2004 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Decree.

E. The defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to the Plaintiff or the trustees of any state or federal trusteeship arising out of the transactions or occurrences alleged in the complaint, nor do they acknowledge that the release or threatened release of hazardous substance(s) at or from the Subsite constitutes an imminent or substantial endangerment to the public health or welfare or the environment. The defendants specifically do not admit any responsibility or liability for contamination in the area defined herein as Phase IV nor do they admit that such contamination is part of the OU1 Remedial Action.

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on June 10, 1986, 51 Fed. Reg. 21054.

G. In response to a release or a substantial threat of a release of hazardous substances at or from the Subsite, in February 1986, EPA commenced a Remedial Investigation ("RI") and in 1990, EPA commenced a Feasibility Study ("FS") for the Ground Water Operable Unit pursuant to 40 C.F.R. § 300.430.

H. The EPA completed a Report of Investigations for the Colorado Avenue Subsite in February 1987. The EPA completed an Engineering Evaluation/Cost Analysis ("EE/CA") for

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the Initial Source Control Operable Unit ("OU 9") and the Ground Water Operable Unit ("OU 1") at the Subsite on February 2, 1988.

I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the Subsite investigation and of the proposed plan for remedial action for OU 9 on February 3, 1988 in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action. The administrative record includes a responsiveness summary to the public comments. The decision by EPA on the remedial action for OU 9 is embodied in a Record of Decision ("ROD") executed on September 28, 1988.

J. The EPA completed a FS for the ground water operable unit in June 1991. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for Interim Remedial Action for OU 1 on July 24, 1991, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action. The administrative record includes a responsiveness summary to the public comments. The decision by EPA on the interim remedial action for OU 1 is embodied in an Interim Action ROD executed on September 30, 1991.

K. The State concurred on both RODs. Notices of the selected remedial actions for OU 9 and OU 1 were published in accordance with Section 117(b) of CERCLA.

L. In January 1998, EPA proposed an amendment to the OU 1 ROD to provide additional options for treating ground water. Pursuant to 40 C.F.R. § 300.435 of the NCP and Section 117 of CERCLA, EPA published notice of the proposed amendment to the OU 1 ROD in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for amending the selected response action set forth in the OU 1 ROD. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the decision to amend the OU 1 ROD. The administrative record includes a responsiveness summary to the public comments.

M. The decision by EPA to amend the ROD for OU 1 was executed on May 20, 1998. The State concurred on the amendment. Notice of the amended ROD for OU 1 was published in accordance with Section 117(b) of CERCLA.

N. Based on the information presently available to EPA, EPA believes that the Work will be properly and promptly conducted by the Settling Defendants and will implement the remedy selected in the OU 9 ROD and OU 1 ROD as amended, excluding Phase IV, if conducted in accordance with the requirements of this Consent Decree and its appendices.

O. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected by the OU 9 ROD and by the OU 1 ROD as amended, referenced above, and the Work to be performed by the Settling Defendants shall constitute a response action taken or ordered by the President.

P. The Parties recognize, and the Court by entering this Consent Decree finds, that: (1) EPA is authorized to enter into this Consent Decree pursuant to Section 122(a) of CERCLA, 42 U.S.C. § 9622(a), (2) this Consent Decree has been negotiated by the Parties in good faith, and (3) implementation of this Consent Decree will expedite the cleanup of the Subsite and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying Complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and upon Settling Defendants and their successors and assigns. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendants' responsibilities under this Consent Decree.

3. Settling Defendants shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing Settling Defendants with respect to the Subsite or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendants or their contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

“Consent Decree” shall mean this Decree and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Decree and any appendix, this Decree shall control.

“Contaminants of Concern” shall mean trichlorethene, 1,1,1-trichloroethane, tetrachloroethane, 1,2-dichloroethane, and 1,1-dichloroethene.

“Day” shall mean a calendar day unless expressly stated to be a working day. “Working day” shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

“Effective Date” shall be the effective date of this Consent Decree as provided in Paragraph 115.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV, and Paragraph 89 of Section XXI. Future Response Costs shall also include all Interim Response Costs, and all Interest on those Past Response Costs Settling Defendants have agreed to reimburse under this Consent Decree that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from January 31, 2004 to the date of entry of this Consent Decree.

“Interim Remedial Action” shall mean the response action selected by EPA in the 1991 Record of Decision for OU 1 at the Colorado Avenue Subsite.

“Interim Response Costs” shall mean all costs, including direct and indirect costs, (a) paid by the United States in connection with the Subsite between October 1, 2002 and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

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“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“NDEQ” shall mean the Nebraska Department of Environmental Quality and any successor departments or agencies of the State.

“Non-Owner Settling Defendant” shall mean Dravo Corporation, its successors and assigns.

“Operation and Maintenance” or “O & M” shall mean all activities required to maintain the effectiveness of the Remedial Actions as required under the Operation and Maintenance Plans approved or developed by EPA pursuant to this Consent Decree and the Statement of Work (SOW).

“OU 1” shall mean the Ground Water Operable Unit 1 established to remediate ground water in the Colorado Avenue Subsite.

“OU 9” shall mean the Initial Source Control Operable Unit 9 consisting of the contaminated soils in the surface and subsurface within the City of Hastings, Nebraska, in an area bounded on the west by Kansas Avenue, on the south by South Street, on the north by the Burlington Northern Railroad, and on the east by Pine Avenue.

“OU 1 Area” is that part of the Colorado Avenue Subsite that is bounded on the west by Kansas Avenue, on the south by South Street, on the north by Burlington Northern Railroad and on the east by the monitoring wells associated with the existing Phase III In-Well Aeration treatment system.

“Owner Settling Defendant” shall mean Desco Corporation and Desco Corporation d/b/a Marshalltown Instruments (jointly “Desco”), its successors and assigns.

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper case letter.

“Parties” shall mean the United States and the Settling Defendants.

“Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Colorado Avenue Subsite through September 30, 2002, as set forth in the Cost Summary/SCORPIOS Report for the Subsite (“EPA Costs”), attached hereto as Appendix H, and costs of \$286,806 incurred on behalf of the Department of Justice through September 30, 2002 (“DOJ Costs”), plus Interest on all such EPA Costs and DOJ Costs which has accrued pursuant to 42 U.S.C. § 9607(a) through January 31, 2004.

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"Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Actions, set forth in Section III of the SOW.

"Phase IV" shall mean that part of the OU 1 Remedial Action to be implemented by EPA in the vicinity of GM-2 and beyond, specifically referenced in the December 24, 2003 notice letter from EPA to Dravo Corporation (attached hereto as Appendix G).

"Plaintiff" shall mean the United States.

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.* (also known as the Resource Conservation and Recovery Act).

"Record of Decision for OU 1" or "OU 1 ROD" shall mean the EPA Interim Action Record of Decision relating to the Ground Water Operable Unit at the Subsite, signed on September 30, 1991 by the Regional Administrator, EPA Region VII, and all attachments thereto and the amendment to the ROD, signed on May 20, 1998 by the delegatee for the Regional Administrator, EPA Region VII, and all attachments thereto. The OU 1 ROD and amendment is attached as Appendix A.

"Record of Decision for OU 9" or "OU 9 ROD" shall mean the EPA Record of Decision relating to the Initial Source Control Operable Unit at the Subsite, signed on September 28, 1988 by the Regional Administrator, EPA Region VII, and all attachments thereto. The OU 9 ROD is attached as Appendix A.

"Remedial Actions" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendants pursuant to this Consent Decree to implement the OU 1 ROD and the OU 9 ROD, in accordance with the SOW and the final Work Plans and other plans approved by EPA.

"Remedial Designs" shall mean those activities to be undertaken by the Settling Defendants to develop the final plans and specifications for the Remedial Actions pursuant to the EPA approved plans.

"Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

"Settling Defendants" shall mean Desco (Owner Settling Defendant) and Dravo Corporation (Non-Owner Settling Defendant).

"Shutdown" shall mean an operational discontinuance of the soil vapor extraction system or the in well aeration and air sparge ground water treatment system which lasts for a period of more than seven (7) days.

"Site" shall mean the Hastings Ground Water Contamination Superfund Site, located in and around Hastings, Adams County, Nebraska, and depicted generally on the map attached as Appendix C.

"State" shall mean the State of Nebraska.

"Statement of Work" or "SOW" shall mean the statement of work for implementation of the Remedial Design/Remedial Action and Operation and Maintenance for the OU 1 Area and



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OU 9, as set forth in Appendix B to this Consent Decree and any modifications made in accordance with this Consent Decree.

"Subsite" or "Colorado Avenue Subsite" shall mean the Colorado Avenue Subsite of the Hastings Ground Water Contamination Site which is located within the City of Hastings and depicted generally on the map attached as Appendix D. The Subsite includes the property located at 108 South Colorado Avenue, the soils between Kansas Avenue on the west, South Street on the south, Pine Avenue on the east and the Burlington Northern Railroad on the north, and the ground water contaminant plume emanating therefrom. The Subsite includes two operable units, OU 1 and OU 9.

"Supervising Contractor" shall mean the principal contractor retained by the Settling Defendants to supervise and direct the implementation of the Work under this Consent Decree as provided in Paragraph 10.

"Unilateral Administrative Order for OU 9" or "OU 9 UAO" shall mean the UAO for Remedial Design and Remedial Action addressing the Initial Source Control Operable Unit at the Subsite that EPA issued to Settling Defendants on September 28, 1990, Docket No. 90-F-0040.

"Unilateral Administrative Order for OU 1" or "OU 1 UAO" shall mean the UAO for Remedial Design and Remedial Action addressing the Ground Water Operable Unit at the Subsite that EPA issued to Settling Defendants on March 28, 1993, Docket No. VII-93-F0019.

"United States" shall mean the United States of America.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous material" under Title 118 of the state of Nebraska regulations.

"Work" shall mean all activities Settling Defendants are required to perform under this Consent Decree, except those required by Section XXV (Retention of Records).

V. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Subsite by the continued implementation of response actions at the Subsite by the Settling Defendants, to reimburse response costs of the Plaintiff, and to resolve the claims of Plaintiff against Settling Defendants as provided in this Consent Decree.

6. Commitments by Settling Defendants.

a. Settling Defendants shall continue to finance and perform the Work, some of which was begun under the OU 1 UAO (operation of in well aeration and air sparge ground water treatment system) and OU 9 UAO (operation of the soil vapor extraction ["SVE"] system), in accordance with this Consent Decree, the RODs, the SOW, and all work plans and other

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plans, standards, specifications, and schedules set forth herein or developed by Settling Defendants and approved by EPA pursuant to this Consent Decree. Settling Defendants shall also reimburse the United States for Past Response Costs and Future Response Costs as provided in this Consent Decree.

b. The obligations of Settling Defendants to continue to finance and perform the Work and to pay amounts owed the United States under this Consent Decree are joint and several. In the event of the insolvency or other failure of one Settling Defendant to implement the requirements of this Consent Decree, the remaining Settling Defendant shall complete all such requirements.

c. Non-Owner Settling Defendant initiated Work at the Subsite pursuant to the OU 1 UAO and the OU 9 UAO. This Consent Decree incorporates the documents generated during performance of Work under the UAOs that are listed in Appendix E. These documents shall remain requirements under this Consent Decree until superseded by approved plans submitted pursuant to this Consent Decree.

d. The Unilateral Administrative Order for OU 1 and the Unilateral Administrative Order for OU 9 shall terminate on the Effective Date.

7. Compliance With Applicable Law. All activities undertaken by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal, state and local laws and regulations. Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all federal, state and local environmental laws including those set forth in the ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits.

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

9. Notice to Successors-in-Title.

a. With respect to any property owned or controlled by the Owner Settling Defendant that is located within the Subsite, within 30 days after the entry of this Consent

Decree, the Owner Settling Defendant shall submit to EPA for review and approval a notice to be filed with the Adams County Register of Deeds, State of Nebraska, which shall provide notice to all successors-in-title that the property located at 108 South Colorado Avenue, Hastings, Nebraska is part of the Colorado Avenue Subsite of the Hastings Ground Water Contamination Site, that EPA selected remedies for the Colorado Avenue Subsite, and that potentially responsible parties have entered into a Consent Decree requiring implementation of the remedies. Such notice shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. The Owner Settling Defendant shall record the notice within 10 days of EPA's approval of the notice. The Owner Settling Defendant shall provide EPA with a certified copy of the recorded notice within 10 days of recording such notice.

b. At least 30 days prior to the conveyance of any interest in property located within the Subsite including, but not limited to, fee interests, leasehold interests, and mortgage interests, the Owner Settling Defendant shall give the grantee written notice of (i) this Consent Decree and (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Subsite (hereinafter referred to as "access agreement") pursuant to Section IX (Access and Institutional Controls). At least 30 days prior to such conveyance, the Owner Settling Defendant conveying the interest shall also give written notice to EPA, the State and the Non-Owner Settling Defendant of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree and access agreement was given to the grantee.

c. In the event of any such conveyance, the Owner Settling Defendant's obligations under this Consent Decree, including, but not limited to, its obligation to provide or secure access, pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to be met by the Owner Settling Defendant. In no event shall the conveyance release or otherwise affect the liability of the Owner Settling Defendant to comply with all provisions of this Consent Decree, absent the prior written consent of EPA. If the United States approves, the grantee may perform some or all of the Work under this Consent Decree.

#### VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

##### 10. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendants pursuant to Sections VI (Performance of the Work by Settling Defendants), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Christine L. Harwood and Michael Baker Jr., Inc. (Supervising Contractors), unless Settling Defendants elect to change Supervising Contractors. If Settling Defendants elect to change Supervising Contractors, they shall notify EPA in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. Any change in Supervising Contractor shall be subject to disapproval by EPA. With respect to any contractor proposed to be Supervising Contractor, Settling Defendants shall demonstrate that the proposed contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for

Environmental Data Collection and Environmental Technology Programs,” (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor’s Quality Management Plan (QMP). The QMP should be prepared in accordance with “EPA Requirements for Quality Management Plans (QA/R-2)” (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA will issue a notice of disapproval or an authorization to proceed. If at any time Settling Defendants propose to change their Supervising Contractor, Settling Defendants shall give such notice to EPA and must obtain an authorization to proceed from EPA before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify Settling Defendants in writing. Settling Defendants shall submit to EPA and the State a list of contractors, including the qualifications of each contractor, that would be acceptable to them within 30 days of receipt of EPA’s disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendants may select any contractor from that list that is not disapproved and shall notify EPA and the State of the name of the contractor selected within 21 days of EPA’s authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendants from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure).

11. Settling Defendants shall comply with all plans, portions of plans, and submittals to EPA that are listed in Appendix E, until such plan or submittal is modified by this Consent Decree.

12. OU 1 Area Work

a. Within 30 days after entry of the Consent Decree, Settling Defendants shall submit to EPA and the State a Work Plan which describes the outstanding tasks to be performed to complete the Remedial Design/Remedial Action for the OU 1 Area.

b. The outstanding tasks include but are not limited to: i) conversion of Phase I (air sparge) wells into ground water monitoring wells; ii) installation of new monitoring wells; and iii) sampling and analysis of the monitoring well network. The OU 1 Work Plan shall also include the plan for updating and resubmitting a Sampling and Analysis Plan (“SAP”), Field Sampling Plan (“FSP”), and Health and Safety Plan (“HSP”). Upon approval of the OU 1 Work Plan by EPA, the OU 1 Work Plan shall be incorporated into and become enforceable under this Consent Decree.

c. After the approval of the OU 1 Work Plan by EPA, the Settling Defendants shall implement the Work set forth in the OU 1 Work Plan in accordance with this Consent Decree, the schedule in the approved Work Plan, and the SOW.

d. In addition to Work required by the OU 1 Work Plan, Settling Defendants shall implement all other Work pertaining to the OU 1 Area that is set forth in the SOW.

13. OU 9 Work

a. Within 60 days after entry of the Consent Decree, Settling Defendants shall submit to EPA and the State a Work Plan which describes the outstanding tasks to be performed to complete the Remedial Design/Remedial Action for OU 9.

b. The outstanding tasks include but are not limited to: i) modifying the existing Phase II (shallow) SVE Design; ii) installing SVE wells, monitoring probes, and vent wells; iii) sampling and analysis; iv) operating the Phase I (deep) and Phase II (shallow) SVE systems; and iv) submittal of reports and plans. Upon approval of the OU 9 Work Plan by EPA, the OU 9 Work Plan shall be incorporated into and become enforceable under this Consent Decree.

c. After the approval of the OU 9 Work Plan by EPA, the Settling Defendants shall implement the OU 9 Work Plan in accordance with this Consent Decree, the schedule in the approved Work Plan, and the SOW.

d. In addition to Work required by the OU 9 Work Plan, Settling Defendants shall implement all other Work pertaining to OU 9 that is set forth in the SOW.

14. O&M and Performance Monitoring for the OU 1 Area and OU 9

a. Settling Defendants shall perform O&M for the OU 1 Area in accordance with Section IX of the SOW and shall implement Performance Monitoring in accordance with Section X of the SOW. Consistent with the OU 1 ROD, Settling Defendants shall implement the approved Ground Water Monitoring Plan required by Task 3, Section X of the SOW.

b. Settling Defendant shall prepare Post-Treatment Monitoring Reports annually for 10 years after ground water treatment activities required by this Consent Decree are concluded.

c. Settling Defendants shall perform O&M for OU 9 in accordance with Section IX of the SOW and shall implement Performance Monitoring in accordance with Section X of the SOW. Upon notification by EPA pursuant to Task 4, Section X of the SOW, Settling Defendants shall complete decommissioning and abandonment activities for all SVE related installations at the Subsite.

15. Settling Defendants shall review the Health and Safety Plans ("HSPs") they previously submitted as a requirement of the OU 1 UAO and the OU 9 UAO and shall revise the HSPs, if necessary, to conform to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120. If revised, Settling Defendants shall resubmit two HSPs to EPA or may submit one HSP for both OU 1 and OU 9 in accordance with the schedule set forth in the SOW.

16. The Settling Defendants shall submit to EPA and NDEQ all deliverables required under the approved OU 1 and OU 9 Work Plans and all other deliverables required by the SOW, in accordance with the schedule set forth in the SOW. The EPA will review all such plans, submittals, and deliverables pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Settling Defendants shall not commence

physical on-site activities until EPA approves the plans, reports or other items required to be submitted for approval pursuant to this Consent Decree.

17. Modification of the SOW or Related Work Plans.

a. If EPA determines that modification to the Work specified in the SOW and/or in Work Plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedies set forth in the OU 1 ROD and the OU 9 ROD, EPA may require that such modification be incorporated in the SOW and/or such Work Plans, provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the remedies selected in the OU 1 ROD and the OU 9 ROD.

b. Notwithstanding Paragraph 17a., EPA may not require modification of the Work specified in the SOW and/or Work Plans to incorporate implementation of Phase IV by Settling Defendants.

c. For the purposes of this Paragraph 17 and Paragraph 55 only, the "scope of the remedies selected in the OU 1 ROD and the OU 9 ROD" shall mean the implementation of the 1) existing ground water treatment systems and monitoring during the treatment; 2) soil vapor extraction systems and monitoring during the treatment at the Subsite until all Performance Standards set forth in Section III of the SOW are achieved, and for so long thereafter as is otherwise required by EPA under this Consent Decree; and 3) post-treatment ground water monitoring.

d. If Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX (Dispute Resolution), Paragraph 72 (record review). The SOW and or related Work Plans shall be modified in accordance with final resolution of the dispute.

e. Settling Defendants shall implement any Work required by any modifications incorporated in the SOW and/or in Work Plans developed pursuant to the SOW in accordance with this Paragraph.

f. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree, however, EPA will not require Settling Defendants to implement Phase IV.

18. Settling Defendants acknowledge and agree that nothing in this Consent Decree, the SOW, or the Work Plans constitutes a warranty or representation of any kind by Plaintiff that compliance with the Work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards.

19. Settling Defendants shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification requirement shall

not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

a. The Settling Defendants shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Settling Defendants shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by the Settling Defendants following the award of the contract for Remedial Action construction. The Settling Defendants shall provide the information required by Paragraph 19.a. as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

20. Before shipping any hazardous substances, pollutants, or contaminants from the Subsite to an off-site location, Settling Defendants shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. 300.440. Settling Defendants shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulations cited in the preceding sentence.

## VII. REMEDY REVIEW

21. Periodic Review. Settling Defendants shall conduct any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of whether the OU 1 and OU 9 Remedial Actions are protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

22. EPA Selection of Further Response Actions. If EPA determines, at any time, that the OU 1 or OU 9 Remedial Actions are not protective of human health and the environment, EPA may select further response actions for the Subsite in accordance with the requirements of CERCLA and the NCP; provided, however, EPA may not require Settling Defendant to implement Phase IV of the OU 1 Remedial Action.

23. Opportunity To Comment. Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period. Prior to initiation of any comment period, Settling Defendants shall be provided with all information on which EPA bases its decision to require further response actions. The comment period shall be a minimum of thirty (30) days.

24. Settling Defendants' Obligation To Perform Further Response Actions. If EPA selects further response actions as part of the Remedial Actions for OU 1 or OU 9, the Settling Defendants shall undertake such further response actions to protect the public from exposure to ground water exceeding the Performance Standards for the Contaminants of Concern. Settling

Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the Remedial Actions are not protective of human health and the environment, or (2) EPA's selection of the further response actions. Disputes pertaining to whether the Remedial Actions are protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 72 (record review).

25. Submissions of Plans. If Settling Defendants are required to perform further response actions pursuant to Paragraph 24, they shall submit a plan for such Work to EPA for approval in accordance with the procedures set forth in Section VI (Performance of the Work by Settling Defendants) and shall implement the plan approved by EPA in accordance with the provisions of this Decree.

#### VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

26. Settling Defendants shall use quality assurance, quality control, and chain of custody procedures for all design, compliance and monitoring samples in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003, March 2001) "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998), and subsequent amendments to such guidelines upon notification by EPA to Settling Defendants of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendants shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan ("QAPP") that is consistent with the SOW, the NCP and applicable guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Settling Defendants shall ensure that EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendants in implementing this Consent Decree. In addition, Settling Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated October 2004, and any amendments made thereto during the course of the implementation of this Decree; however, upon approval by EPA, after opportunity for review and comment by the State, the Settling Defendants may use other analytical methods which are as stringent as or more stringent than the CLP- approved methods. Settling Defendants shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Settling Defendants shall only use laboratories that have a documented Quality System which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by



EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) as meeting the Quality System requirements. Settling Defendants shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

27. In order to permit EPA to affirm that Settling Defendants are properly taking and analyzing samples taken pursuant to the SOW, upon request, the Settling Defendants shall allow split or duplicate samples to be taken by EPA or its authorized representatives. Settling Defendants shall notify EPA not less than 14 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. EPA shall also have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow the Settling Defendants to take split or duplicate samples of any samples EPA takes as part of the Plaintiffs' oversight of the Settling Defendants' implementation of the Work.

28. Settling Defendants shall submit to EPA and the State two copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants as part of the implementation of this Consent Decree unless EPA agrees otherwise.

29. Notwithstanding any provision of this Consent Decree, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

#### IX. ACCESS AND INSTITUTIONAL CONTROLS

30. If the Subsite, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned or controlled by any of the Settling Defendants, such Settling Defendants shall:

a. Commencing on the date of lodging of this Consent Decree, provide the United States and its representatives, including EPA and its contractors, with access at all reasonable times to the Subsite, or such other property, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States;
- (3) Conducting investigations relating to contamination at or near the Subsite;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Subsite;
- (6) Assessing implementation of quality assurance and quality control practices as defined in the approved Quality Assurance Project Plans;

- (7) Implementing the Work pursuant to the conditions set forth in Paragraph 89 (Work Takeover) of this Consent Decree;
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXIV (Access to Information);
- (9) Assessing Settling Defendants' compliance with this Consent Decree; and
- (10) Determining whether the Subsite or other property is being used in a manner that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. Commencing on the date of lodging of this Consent Decree, refrain from using the Subsite, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Consent Decree.

c. On May 20, 2005, Settling Defendants recorded in the Adams County Register of Deeds, Adams County, Nebraska, an environmental covenant, running with the land for the property owned by Owner Settling Defendant which encompasses the Subsite, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities set forth in Section VII and VIII of the SOW, and (ii) grants the right to enforce the restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Through this environmental covenant, Owner Settling Defendant granted (i) the access rights and the rights to enforce the land/water use restrictions to the Non-Owner Settling Defendant and its representatives and (ii) the right to enforce the terms of the environmental covenant to EPA. On August 22, 2005 Non-Owner Settling Defendant conducted a title search in the Adams County Register of Deeds, Adams County Nebraska. The report of this title search was provided to Plaintiff and is attached hereto as Appendix I.

31. If the Subsite, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned or controlled by persons other than any of the Settling Defendants, Settling Defendants shall use best efforts to secure from such persons:

a. an agreement to provide access thereto for Settling Defendants, as well as for the United States on behalf of EPA, and the State, as well as their representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree and shall provide EPA a copy of the access agreement in accordance with the Schedule set forth in Section XIII of the SOW;

b. an agreement, enforceable by the Settling Defendants and the United States, to refrain from using the Subsite, or such other property, in any manner that would interfere with

or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Consent Decree; and

c. if requested by EPA, the execution and recordation in the Adams County Register of Deeds of an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 30.a. of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the Remedial Actions to be performed pursuant to this Consent Decree. The access rights and/or rights to enforce land/water use restrictions shall be granted to (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the Settling Defendants and their representatives, and/or (iv) other appropriate grantees. If requested by EPA, within 45 days of this request, Settling Defendants shall submit to EPA for review and approval with respect to such property:

(1) a draft easement, in substantially the form attached hereto as Appendix F, that is enforceable under the laws of the State of Nebraska, and

(2) a current title insurance commitment, or some other evidence of title acceptable to EPA, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA or when, despite best efforts, Settling Defendants are unable to obtain release or subordination of such prior liens or encumbrances).

Within 15 days of EPA's approval and acceptance of the easement and the title evidence, Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment to affect the title adversely, the easement shall be recorded with the Adams County Register of Deeds. Within 30 days of the recording of the easement, Settling Defendants shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded easement showing the clerk's recording stamps. If the easement is to be conveyed to the United States, the easement and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title must be obtained as required by 40 U.S.C. § 255.

32. For purposes of Paragraph 31 of this Consent Decree, "best efforts" includes the payment of reasonable sums of money in consideration of access, access easements, land/water use restrictions, restrictive easements, and/or an agreement to release or subordinate a prior lien or encumbrance. If (a) any access or land/water use restriction agreements required by Paragraphs 31.a or 31.b of this Consent Decree are not obtained within 45 days of the request by EPA (b) or any access easements or restrictive easements required by Paragraph 31.c of this Consent Decree are not submitted to EPA in draft form within 45 days of the date of entry of this Consent Decree, or (c) Settling Defendants are unable to obtain an agreement pursuant to Paragraph 31.c.(2) from the holder of a prior lien or encumbrance to release or subordinate such lien or encumbrance to the easement being created pursuant to this Consent Decree within 45 days of the request by EPA, Settling Defendants shall promptly notify the United States in

writing, and shall include in that notification a summary of the steps that Settling Defendants have taken to attempt to comply with Paragraph 31 of this Consent Decree. The United States may, as it deems appropriate, assist Settling Defendants in obtaining access or land/water use restrictions, either in the form of contractual agreements or in the form of easements running with the land, or in obtaining the release or subordination of a prior lien or encumbrance. Settling Defendants shall reimburse the United States in accordance with the procedures in Section XVI (Reimbursement of Response Costs), for all costs incurred, direct or indirect, by the United States in obtaining such access, land/water use restrictions, and/or the release/subordination of prior liens or encumbrances including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation.

33. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedies selected in the RODs and the ROD amendment, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall cooperate with EPA's efforts to secure such governmental controls.

34. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

#### X. REPORTING REQUIREMENTS

35. In addition to any other requirement of this Consent Decree, beginning in the year when this Consent Decree is entered, Settling Defendants shall submit Quarterly Progress Reports to EPA and the State. The Quarterly Progress Reports shall (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous period; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendants or their contractors or agents in the period; (c) identify all plans, reports and other deliverables required by this Consent Decree submitted during the previous period; (d) describe all actions, including, but not limited to, data collection and implementation of Work Plans, which are scheduled for the next period and provide other information relating to the progress of construction; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; and (f) summary of deliverables submitted to EPA during the reporting period including modifications to Work Plans. Settling Defendants shall submit these Progress Reports to EPA and the State in accordance with the Schedule in the SOW, until EPA notifies the Settling Defendants pursuant to Section X, Task 2 of the SOW. If requested by EPA, Settling Defendants shall also provide telephonic briefings for EPA to discuss the progress of the Work.

36. Settling Defendants shall submit Status Notification Reports as required by the SOW to report any scheduled or unscheduled Shutdown of the OU 1 Area and OU 9 treatment systems.

37. The Settling Defendants shall notify EPA of any change in the schedule described in the progress report for the performance of any activity, including, but not limited to, data collection and implementation of Work Plans, no later than seven days prior to the performance of the activity.

38. Upon the occurrence of any event during performance of the Work that Settling Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), Settling Defendants shall, within 24 hours of the onset of such event, orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region VII, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

39. Within 20 days of the onset of such an event, Settling Defendants shall furnish to Plaintiff, a written report, signed by the Settling Defendants' Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken in response thereto.

40. Settling Defendants shall submit two copies of all deliverables (plans, reports, data) required by the SOW, in accordance with the schedules set forth in the deliverables. Settling Defendants shall simultaneously submit one copy of all such plans, reports and data to the State. Upon request by EPA, Settling Defendants shall submit in electronic form all portions of any report or other deliverable Settling Defendants are required to submit pursuant to the provisions of this Consent Decree.

41. All reports and other documents submitted by Settling Defendants to EPA (other than the Progress Reports referred to above) which purport to document Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendants.

#### XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

42. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendants modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendants at least one notice of deficiency and an opportunity to cure within 30 days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

43. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 42 (a), (b), or (c), Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 42(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

44. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 42(d), Settling Defendants shall, within 30 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the 30-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 45 and 46.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 42(d), Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendants of any liability for stipulated penalties under Section XX (Stipulated Penalties).

45. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. Settling Defendants shall implement any such plan, report, or item as modified or developed by EPA, subject only to their right to invoke the procedures set forth in Section XIX (Dispute Resolution).

46. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendants shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the Settling Defendants invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XX.

47. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

## XII. PROJECT COORDINATORS

48. Settling Defendants have designated Lisa Potts as their Project Coordinator and Robert Thomson as their Alternate Project Coordinator. The EPA has designated Darrell Sommerhauser as its Project Coordinator and William Gresham as its Alternate Project Coordinator. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. If the Settling Defendants' Project Coordinator is changed, the newly designated Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendants' Project Coordinator shall not be an attorney for the Settling Defendants. He or she may assign other representatives, including other contractors, to serve as a Subsite representative for oversight of performance of daily operations during remedial activities.

49. Plaintiff may designate other representatives, including, but not limited to, EPA employees, and federal contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and an On-Scene Coordinator ("OSC") by the NCP. In addition, EPA's Project Coordinator shall have authority, consistent with the NCP, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Subsite constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

50. EPA's Project Coordinator and the Settling Defendants' Project Coordinator will confer on a regular, scheduled basis as set forth in the Work Plans.

## XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

51. Within 30 days of entry of this Consent Decree, Settling Defendants shall establish and maintain financial security in the amount of \$ 3,280,000.00. At the same time that Settling Defendants establish financial security, Settling Defendants shall provide written evidence of the financial security that is in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work;
- b. One or more irrevocable letters of credit equaling the total estimated cost of the Work;
- c. A trust fund;
- d. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with at least one of the Settling Defendants; or
- e. A demonstration that one or more of the Settling Defendants satisfy the requirements of 40 C.F.R. Part 264.143(f). Financial information for this demonstration may be

derived from the audited financial statements of Settling Defendants' parent corporation for the full calendar year preceding the Effective Date.

52. If the Settling Defendants seek to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 51.d. of this Consent Decree, Settling Defendants shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendants seek to demonstrate their ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 51.d. or 51.e., they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendants shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 51 of this Consent Decree. Settling Defendants' inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

53. If Settling Defendants can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 51 above after entry of this Consent Decree, Settling Defendants may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Settling Defendants shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Settling Defendants may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

54. Settling Defendants may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Settling Defendants may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

#### XIV. CERTIFICATION OF COMPLETION

##### 55. Completion of the Work.

a. Settling Defendants shall follow the procedures, Project Completion Request, Implementation of Project Completion Plan, and Completion of Work set forth in Section XI of the SOW. Within 90 days after Settling Defendants conclude they have performed all phases of the Work (including O&M), Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants and EPA. Following the inspection, EPA will notify Settling Defendants in writing that the Settling Defendants must schedule a remedial action final inspection ("RA Final Inspection") after addressing the matters set forth in EPA's notice or that the pre-certification inspection will serve as the RA Final Inspection. Within 30 days after receiving notice from EPA that a RA Final Inspection is necessary, Settling Defendants shall schedule and conduct a RA Final Inspection to be attended



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by Settling Defendants and EPA. If, after the RA Final Inspection, the Settling Defendants still believe that the Work has been fully performed, within 45 days of the RA Final Inspection, Settling Defendants shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of a Settling Defendant:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Additional requirements regarding the content of the report are described in Section XI.C. of the SOW. If, after review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Work, provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedies selected in the OU 1 ROD and the OU 9 ROD," as that term is defined in Paragraph 17.c. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Settling Defendants and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify the Settling Defendants in writing.

XV. EMERGENCY RESPONSE

56. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Subsite that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendants shall, subject to Paragraph 57, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendants shall notify the EPA Emergency Response Unit, Region VII. Settling Defendants shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that

Settling Defendants fail to take appropriate response action as required by this Section, and EPA takes such action instead, Settling Defendants shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Payments for Response Costs).

57. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Subsite, subject to Section XXI (Covenants Not to Sue by Plaintiff).

XVI. PAYMENTS FOR RESPONSE COSTS

58. Payments for Past Response Costs.

a. Within 30 days of the Effective Date, Settling Defendants shall pay to EPA \$7,300,000.00 in payment for Past Response Costs. Payment shall be made by wire transfer to the U.S. Department of Justice account in accordance with current wire transfer procedures, referencing USAO File Number 2001V00383, EPA Site/Spill ID Number 07S2, and DOJ Case Number DJ#90-11-2-1260/1. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Nebraska following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

b. At the time of payment, Settling Defendants shall send notice that payment has been made to the United States, to EPA and to the Regional Financial Management Officer, in accordance with Section XXVI (Notices and Submissions).

c. The total amount to be paid by Settling Defendants pursuant to Subparagraph 58.a. shall be deposited in the Hastings Ground Water Contamination Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

59. Payments for Future Response Costs.

a. Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the NCP, excluding \$735,575.80 (US Department of Justice Interim Response Costs from October 1, 2002 through September 30, 2004). On a periodic basis the United States will send Settling Defendants a bill requiring payment that includes an itemized cost summary. Settling Defendants shall make all payments within 45 days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 60. Settling Defendants shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, EPA Site/Spill ID Number 07S2, OU 1 and OU 9 and DOJ Case Number DJ#90-11-2-1260/1. Settling Defendants shall send the checks to:

*U.S. v. Dravo Corporation, et al. Consent Decree  
Hastings Ground Water Contamination Site Colorado Avenue Subsite Operable Units 01 and 09*

EPA Hazardous Substance Superfund  
EPA Region VII  
P.O. Box 371099M  
Pittsburgh, PA 15251

If the amount due is \$25,000 or more, Settling Defendants shall wire transfer the funds, following the instructions set forth in Paragraph 58.a.

b. At the time of payment, Settling Defendants shall send notice that payment has been made to the United States, to EPA and to the Regional Financial Management Officer, in accordance with Section XXVI (Notices and Submissions).

c. Future Response Costs will be deposited in the Hastings Ground Water Contamination Site Special Account within the EPA Hazardous Substance Superfund.

60. Settling Defendants may contest payment of any Future Response Costs billed pursuant to Paragraph 59 if they determine that the United States has made an accounting error or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection and any request for supporting cost documentation shall be made in writing within 45 days of receipt of the bill and must be sent to the United States pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the potential basis for objection. In the event of an objection, the Settling Defendants shall within the 45 day period pay all uncontested Future Response Costs to the United States in the manner described in Paragraph 59. Simultaneously, the Settling Defendants shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Pennsylvania and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendants shall send to the United States and EPA, as provided in Section XXVI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. If Settling Defendants have not requested supporting cost documentation, simultaneously with establishment of the escrow account, the Settling Defendants shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If Settling Defendants have made a timely request for supporting cost documentation, Settling Defendants shall have 45 days from their receipt of the supporting documentation to initiate the dispute resolution process provided in Section XIX (Dispute Resolution). If the United States prevails in the dispute, within 5 days of the resolution of the dispute, the Settling Defendants shall pay the sums due (with accrued interest) to the United States in the manner described in Paragraph 59. If the Settling Defendants prevail concerning any aspect of the contested costs, the Settling Defendants shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States in the manner described in Paragraph 59; Settling Defendants shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute

Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendants' obligation to reimburse the United States for its Future Response Costs.

61. In the event that the payments required by Subparagraph 58.a. are not made within 30 days of the Effective Date or the payments required by Paragraph 59 are not made within 45 days of the Settling Defendants' receipt of the bill, Settling Defendants shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue on the Effective Date. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the Settling Defendants' payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Settling Defendants' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 76. The Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 59.

#### XVII. INDEMNIFICATION AND INSURANCE

##### 62. Settling Defendants' Indemnification of the United States.

a. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendants shall indemnify, save and hold harmless the United States, and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Settling Defendants agree to pay the United States all costs it incurs including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. The United States shall not be held out as a party to any contract entered into by or on behalf of Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendants nor any such contractor shall be considered an agent of the United States.

b. The United States shall give Settling Defendants notice of any claim for which the United States plans to seek indemnification pursuant to Paragraph 62, and shall consult with Settling Defendants prior to settling such claim.

63. Settling Defendants waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Subsite,

including, but not limited to, claims on account of construction delays. In addition, Settling Defendants shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Subsite, including, but not limited to, claims on account of construction delays.

64. No later than 15 days before commencing any on-site Work, Settling Defendants shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion pursuant to Subparagraph 55.b. of Section XIV (Certification of Completion) comprehensive general liability insurance with limits of \$5,000,000, combined single limit, and automobile liability insurance with limits of \$2,000,000 combined single limit, naming the United States as an additional insured. In addition, for the duration of this Consent Decree, Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendants shall provide to EPA certificates of such insurance and a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendants demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

#### XVIII. FORCE MAJEURE

65. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the obligation. The requirement that the Settling Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (1) as it is occurring and (2) following the potential force majeure such that the delay is minimized to the greatest extent possible. Force majeure does not include financial inability to complete the Work or a failure to attain the Performance Standards.

66. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure the Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund Division, EPA Region VII, within 48 hours of when Settling Defendants first knew that the event might cause a delay. Within 7 days thereafter, Settling Defendants shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to

prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendants' rationale for attributing such delay to a force majeure if they intend to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendants shall be deemed to know of any circumstance of which Settling Defendants, any entity controlled by Settling Defendants, or Settling Defendants' contractors knew or should have known.

67. If EPA agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this Consent Decree that are affected by the force majeure will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify the Settling Defendants in writing of its decision. If EPA agrees that the delay is attributable to a force majeure, EPA will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

68. If the Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution) to contest EPA's determination that the delay or anticipated delay was not attributable to a force majeure, they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendants complied with the requirements of Paragraphs 65 and 66, above. If Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

#### XIX. DISPUTE RESOLUTION

69. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

70. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless

it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

71. Statements of Position.

a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 15 days after the conclusion of the informal negotiation period, Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendants. The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 72 or Paragraph 73.

b. Within 21 days after receipt of Settling Defendants' Statement of Position, EPA will serve on Settling Defendants its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 72 or 73. Within 7 days after receipt of EPA's Statement of Position, Settling Defendants may submit a Reply.

c. If there is disagreement between EPA and the Settling Defendants as to whether dispute resolution should proceed under Paragraph 72 or 73, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Settling Defendants ultimately appeal to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 72 and 73.

72. Disputes That Pertain to Selection or Adequacy of Response Action Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action, including future response actions required pursuant to Paragraphs 22 – 24, and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of the RODs' provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director, Superfund Division, Region VII, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 72.a. This decision shall be binding upon the Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 72.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 72.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendants with the Court and served on all Parties within 10 days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendants' motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Director, Superfund Division, Region VII, is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 72.a.

73. Disputes That Do Not Pertain to Selection or Adequacy of Response Action

Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph. This procedure shall govern disputes involving objections to Future Response Costs made pursuant to Paragraph 60.

a. Following receipt of Settling Defendants' Statement of Position submitted pursuant to Paragraph 71, the Director, Superfund Division, Region VII, will issue a final decision resolving the dispute. The Regional Judicial Officer's decision shall be binding on the Settling Defendants unless, within 10 days of receipt of the decision, the Settling Defendants file with the Court and serve on the Parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendants' motion.

b. Notwithstanding Paragraph M of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

74. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 83. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).



XX. STIPULATED PENALTIES

75. Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 76 and 77 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). "Compliance" by Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

76. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph 76.b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1000	1st through 14th day
\$ 2000	15th through 30th day
\$ 3000	31st day and beyond

b. Compliance Milestones.

(1) Failure to submit an adequate or timely OU 1 Area Work Plan, in accordance with Sections VII and XIII of the SOW;

(2) Failure to submit an adequate or timely OU 9 Work Plan, in accordance with Sections VIII and XIII of the SOW;

(3) Failure to submit an adequate or timely O&M Work Plan, in accordance with Sections IX and XIII of the SOW;

(4) Failure to adequately or timely perform the Work required by the approved OU 1 Area Work Plan, in accordance with Sections VII and XIII of the SOW;

(5) Failure to adequately or timely perform the Work required by the approved OU 9 Work Plan, in accordance with Sections VIII and XIII of the SOW;

(6) Failure to adequately or timely perform the Work required by the approved O&M Work Plan, in accordance with Sections IX and XIII of the SOW;

(7) Failure to adequately or timely install three new monitoring wells, in accordance with Section VII (Task 2 - Monitoring Well Installation) and Section XIII of the SOW.

77. Stipulated Penalty Amounts - Reports.

The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents listed in Section XIII of the SOW, but excluding the deliverables listed in Paragraph 76.a. and 76.b.:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$800	1st through 14th day
\$1500	15th through 30th day
\$2000	31st day and beyond

78. In the event that EPA assumes performance of a portion or all of the OU 1 Area and OU 9 Work, pursuant to Paragraph 89 of Section XXI (Covenants Not to Sue by Plaintiff), Settling Defendants shall be liable for a stipulated penalty in the amount of up to \$3,538,000.00. If EPA only assumes performance of a portion or all of the OU 1 Area Work, Settling Defendants shall be liable for a stipulated penalty of up to \$1,788,000.00. If EPA only assumes performance of a portion or all of the OU 9 Work, Settling Defendants shall be liable for a stipulated penalty of up to \$1,750,000.00. If EPA assumes performance of all or a portion of the Work, stipulated penalties shall continue to accrue pursuant to Paragraphs 76 and 77 only for those portions of the Work EPA has not assumed. However, EPA may send Settling Defendants a written demand for the payment of any penalties which accrued pursuant to Paragraphs 76 and 77 prior to EPA's assumption of the Work.

79. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Defendants of any deficiency; (2) with respect to a decision by the Regional Judicial Officer under Paragraph 76.b or 77.a of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

80. Following EPA's determination that Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA will give Settling Defendants written notification of the same and describe the noncompliance. EPA may send the Settling Defendants a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Settling Defendants of a violation.

81. All penalties accruing under this Section shall be due and payable to the United States within 30 days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to EPA Hazardous Substances Superfund, EPA Region VII, P.O. Box 371099M, Pittsburgh, PA 15251, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID 07S2, OU 1 and OU 9, the DOJ Case Number DJ#90-11-2-1260/1, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVI (Notices and Submissions), and to the EPA Project Coordinator and Regional Financial Management Officer, as provided in Section XXVI (Notices and Submissions).

82. The payment of penalties shall not alter in any way Settling Defendants' obligation to complete the performance of the Work required under this Consent Decree.

83. Penalties shall continue to accrue as provided in Paragraph 75 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within 15 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to be owed to EPA within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any Party, Settling Defendants shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Settling Defendants to the extent that they prevail.

84. If Settling Defendants fail to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as interest allowed by law. Settling Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 81.

85. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, provided, however, that the United States shall not seek civil penalties

pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

86. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XXI. COVENANTS NOT TO SUE BY PLAINTIFF

87. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraph 88 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA for penalties related to the OU 1 UAO and the OU 9 UAO as amended issued pursuant to Section 106 of CERCLA, for performance of the Work and for recovery of Past Response Costs and Future Response Costs. These covenants not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 58.a. of Section XVI (Payments for Response Costs). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

88. General reservations of rights. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within Plaintiff's covenant not to sue. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants with respect to:

- a. claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Subsite;
- c. liability based upon the Settling Defendants' ownership or operation of the Subsite, or upon the Settling Defendants' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Subsite, other than as provided in the RODs, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by the Settling Defendants;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. criminal liability;
- f. liability for violations of federal or state law which occur during or after implementation of the Remedial Action specified herein; and
- g. liability for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 17

(Modification of the SOW or Related Work Plans); however, EPA will not require Settling Defendants to implement Phase IV of the OU 1 Remedial Action;

h. liability for additional operable units at the Site or the final response action at the Subsite; however, EPA will not require Settling Defendants to implement Phase IV of the OU 1 Remedial Action;

i. liability for costs that the United States will incur related to the Site but are not within the definition of Future Response Costs;

89. Work Takeover In the event EPA determines that Settling Defendants have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 72, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Payments for Response Costs).

90. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

## XXII. COVENANTS BY SETTLING DEFENDANTS

91. Covenant Not to Sue. Subject to the reservations in Paragraph 92, Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to: the Work, past response actions, and Past and Future Response Costs as defined herein, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

Except as provided in Paragraph 94 (Waiver of Claims Against De Micromis Parties), and Paragraph 99 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event that the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 88(b) – (d) or 87(g) – (i), but only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

92. The Settling Defendants reserve, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

93. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

94. Settling Defendants agree not to assert any claims and to waive all claims or causes of action, which they have not already asserted prior to signing this Consent Decree, that they may have for all matters relating to the Subsite, including for contribution, against any person where the person's liability to Settling Defendants with respect to the Subsite is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Subsite, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if the materials contributed by such person to the Subsite containing hazardous substances did not exceed the greater of (i) 0.002% of the total volume of waste at the Subsite, or (ii) 110 gallons of liquid materials or 200 pounds of solid materials. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Subsite by such person contributed or could contribute significantly to the costs of response at the Subsite. This waiver also shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Subsite against such Settling Defendant.

#### XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

95. Except as provided in Paragraph 94 (Waiver of Claims Against De Micromis Parties), Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Except as provided in Paragraph 94 (Waiver of Claims Against De Micromis Parties), each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Subsite against any person not a Party hereto.

96. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Consent Decree. Matters addressed means the Work required by this Consent Decree and the Past and Future Response Costs, as defined herein.

97. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States in writing no later than 30 days prior to the initiation of such suit or claim.

98. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States within 10 days of service of the complaint on them. In addition, Settling Defendants shall notify the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

99. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Subsite, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants Not to Sue by Plaintiff).

#### XXIV. ACCESS TO INFORMATION

100. Settling Defendants shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Subsite or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendants shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

##### 101. Business Confidential and Privileged Documents.

a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public

may be given access to such documents or information without further notice to Settling Defendants.

b. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

102. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Subsite.

#### XXV. RETENTION OF RECORDS

103. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 55.b. of Section XIV (Certification of Completion of the Work), each Settling Defendant shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Subsite, provided, however, that Settling Defendants who are potentially liable as owners or operators of the Subsite must retain, in addition, all documents and records that relate to the liability of any other person under CERCLA with respect to the Subsite. Each Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) prepared by it or its contractors and now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work, provided, however, that each Settling Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary. Settling Defendants may preserve any paper document required to be retained by this Paragraph by transferring the original and non-identical copies of the document to an electronic medium and retaining the electronic version.

104. At the conclusion of this document retention period, Settling Defendants shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendants shall deliver any such records or documents to EPA. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other



privilege recognized by federal law. If the Settling Defendants assert such a privilege, they shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

105. Record Retention Certification

a. Non-Owner Settling Defendant hereby certifies that all records, documents or other information of its operations at 108 South Colorado Avenue that existed at the time it sold its operations in 1982, were given to Hastings Industries, Inc. at that time. After a thorough inquiry, Non-Owner Settling Defendant further certifies that, to the best of its knowledge and belief, it has not intentionally altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) obtained or generated in its investigation of its potential liability regarding the Subsite pursuant to Section 107(a) of CERCLA. Non-Owner Settling Defendant also certifies it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information (other than identical copies) regarding its former ownership of the facility at 108 South Colorado Avenue.

b. Owner Settling Defendant hereby certifies that to the best of its knowledge and belief, after thorough inquiry, other than documents relating to its ownership of the facility at 108 South Colorado Avenue, it has never had and does not currently possess any documents pertaining to its potential liability at the Colorado Avenue Subsite. Owner Settling Defendant also certifies it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information (other than identical copies) regarding its ownership of the facility at 108 South Colorado Avenue.

c. Each Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e).

XXVI. NOTICES AND SUBMISSIONS

106. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, and the Settling Defendants, respectively.

*U.S. v. Dravo Corporation, et al. Consent Decree  
Hastings Ground Water Contamination Site Colorado Avenue Subsite Operable Units 01 and 09*

As to the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ #90-11-2-1260/1

As to EPA:

Mr. Darrell Sommerhauser  
EPA Project Coordinator  
U.S. EPA, Region VII  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Mr. John Anderson  
U.S. EPA Regional Financial Manager  
U.S. EPA, Region VII  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

As to the State:

Mr. Mike Felix  
State Project Coordinator  
Nebraska Department of Environmental Quality  
1200 N Street Suite 400  
Lincoln, Nebraska 68509-8922

As to the Settling Defendants:

Lawrence A. Demase, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219

Kevin J. Whyte, Esquire  
Carmeuse North America  
11 Stanwix Street, 11th Floor  
Pittsburgh, PA 15222

Ms. Lisa Potts  
Settling Defendants' Project Coordinator  
Director of Environmental and Safety Compliance  
Carmeuse North America  
11 Stanwix Street, 11th Floor  
Pittsburgh, PA 15222

XXVII. EFFECTIVE DATE

107. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXVIII. RETENTION OF JURISDICTION

108. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendants for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) hereof.

XXIX. APPENDICES

109. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the OU 1 ROD and ROD amendment and the OU 9 ROD.

“Appendix B” is the SOW.

“Appendix C” is the map of the Site.

“Appendix D” is the map of the Subsite.

“Appendix E” is a list of UAO OU 1 and UAO OU 9 documents.

“Appendix F” is an example of an easement.

"Appendix G" is the December 24, 2003 notice letter from EPA to Dravo Corporation.

"Appendix H" is the EPA Cost Summary/SCORPIOS Report for the Subsite.

"Appendix I" is the August 22, 2005 report on a title search.

### XXX. COMMUNITY RELATIONS

110. Settling Defendants shall propose to EPA their participation in the community relations plan to be developed by EPA. EPA will determine the appropriate role for the Settling Defendants under the Plan. Settling Defendants shall also cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Subsite.

### XXXI. MODIFICATION

111. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Settling Defendants. All such modifications shall be made in writing.

112. Except as provided in Paragraph 17 (Modification of the SOW or Related Work Plans), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendants, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii). Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii), may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendants.

113. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

### XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

114. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

115. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXXIII. SIGNATORIES/SERVICE

116. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

117. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

118. Each Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XXXIV. FINAL JUDGMENT

119. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent Decree. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

120. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

Upon execution of this document, the original Consent Decree shall be returned to the United States Attorney's Office and a copy of the Consent Decree shall be maintained in the Clerk's Office.

SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2006.

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United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Dravo Corporation, et al., relating to the Colorado Avenue Subsite of the Hastings Ground Water Contamination Superfund Site.

**FOR THE UNITED STATES OF AMERICA**

SUE ELLEN WOOLDRIDGE  
Assistant Attorney General  
Environment and Natural Resources Division

\_\_\_\_\_  
Date

(  
ELLEN M. MAHAN  
Deputy Section Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
(202) 514-3646

\_\_\_\_\_  
Date

CYNTHIA M. FERGUSON  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
MD Bar  
(202) 616-6560

\_\_\_\_\_  
Date

MICHAEL G. HEAVICAN  
United States Attorney  
District of Nebraska  
LAURIE A. KELLY, ESQ.  
Assistant United States Attorney  
1620 Dodge Street, Suite 1400  
Omaha, NE 68102-1506  
MA Bar 557575  
(402) 661-3700

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Dravo Corporation, et al., relating to the Colorado Avenue Subsite of the Hastings Ground Water Contamination Superfund Site.

1/30/06  
Date

Cecilia Tapia, Division Director  
Superfund Division Director, Region VII  
U.S. Environmental Protection Agency  
901 N. Fifth Street  
Kansas City, Kansas 66101  
(913) 551-7733

1/30/06  
Date


Audrey B. Asher, Esq.  
Senior Assistant Regional Counsel, Region VII  
U.S. Environmental Protection Agency  
901 N. Fifth Street  
Kansas City, Kansas 66101  
MO Bar 31246  
(913) 551-7255

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Dravo Corporation, et al., relating to the Colorado Avenue Subsite of the Hastings Ground Water Contamination Superfund Site.

**FOR DESCO CORPORATION AND DESCO CORPORATION D/B/A  
MARSHALLTOWN INSTRUMENTS INC.**

1/20/06

Date

Signature: 

Name (print): Roger D. Bailey

Title: CFO

Address: 150 E. Campus View Blvd., Suite 250  
Columbus, OH 43235

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): Roger D. Bailey

Title: CFO

Address: 150 E. Campus View Blvd., Suite 250  
Columbus, OH 43235

Ph. Number: 614/888-8855



THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Dravo Corporation, et al., relating to the Colorado Avenue Subsite of the Hastings Ground Water Contamination Superfund Site.

**FOR DRAVO CORPORATION**

1/12/06  
Date

Signature \_\_\_\_\_  
Name (print): Thomas A. Buck  
Title: President  
Address: 11 Stanwix St., 11th Fl.  
Pittsburgh, PA 15222

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): Kevin J. Whyte  
Title: Vice President, General Counsel  
Address: 11 Stanwix St. - 11th Floor  
Pittsburgh, PA 15222  
Ph. Number: 412 995-5520